No. 85-495

In The
Supreme Court of the United States
October Term, 1985

ANSONIA BOARD OF EDUCATION, ET AL.,
Petitioners,

vs.

RONALD PHILBROOK, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT RONALD PHILBROOK

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QUESTIONS PRESENTED

1. Whether the Court of Appeals was correct to remand this Title VII case where the District Court had applied a plainly erroneous legal standard, conditioning relief on a showing by the employee that the discrimination alleged had threatened him with losing his job, and had made no findings which would support its judgment under a proper standard.

2. Whether an employer's rule which explicitly prohibits use of personal leave for "any religious observance" discriminates on the basis of religion in violation of Title VII.

3. Whether an employer who docks an employee's pay for absence due to religious requirements and then requires the employee to do substantial additional work for no pay has failed to reasonably accommodate religious observance as required by Title VII.

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STATEMENT OF THE CASE

Plaintiff-respondent Ronald Philbrook has been a typing and business teacher at Ansonia, Connecticut High School since 1962. J.A. 17. In 1968 he was baptized a member of the Worldwide Church of God. J.A. 18. Among the teachings of this church is the requirement that on certain holy days each year members attend religious services and refrain from gainful employment. J.A. 18-21. The number of such holy days which fall on school days varies from year to year but is usually approximately six. J.A. 20.

The collective bargaining agreements between defendant-petitioner Ansonia Board of Education ("the Board") and defendant-respondent Ansonia Federation of Teachers have since 1967 provided three days paid leave for observance of religious holy days which church laws make obligatory. J.A. 71-101. The contracts have additionally provided three days paid leave for "necessary personal business," but since 1970 teachers have been prohibited from using this leave for "any religious activity" or "any religious observance." *Id.* The Board has treated Philbrook's absences for religious observance in excess of three per year as unauthorized and for each day of absence has docked his salary, the prescribed penalty for unauthorized absence. J.A. 54, 74,76,78,81,84,87,90,93,97,101. When Philbrook is absent for religious observance, he prepares lesson plans in advance for his substitute to use and later verifies the classwork that has been done by correcting the classwork completed by his students in his absence. J.A. 67-70.

When the Board refused to make any accommodation to Philbrook's religious needs which would not result in

his absences being considered unauthorized and his pay being docked, Philbrook complained to both the EEOC and the Connecticut Commission on Human Rights and Opportunities. J.A. 43-45, 103-10, 115-23. Both agencies investigated, both found probable cause to believe the Board and union were discriminating against Philbrook on the basis of religion, and both attempted to conciliate. *Id.* Among the proposals made by the agencies—all of which were accepted by Philbrook and rejected by his employer—were: permitting Philbrook to use his personal leave days for religious observance; and permitting him to pay the cost of a substitute (which is considerably less than the amount of pay he is docked for attending religious services) and perform extra work to make up any time lost. *Id.*

Philbrook then sued in United States District Court, claiming violations of Title VII and the Free Exercise Clause. J.A. 3-8. The District Court found that Philbrook had not shown any actionable discrimination because he had not shown that he was put to the choice of violating his religious beliefs or "losing his job." *Appendix to Petition for Certiorari* ("App.") 37a. The United States Court of Appeals for the Second Circuit. without reaching the constitutional claim, noted that the basis of the District Court's judgment was inconsistent with Title VII's prohibition of discrimination "with respect to . . . compensation, terms, conditions, or privileges of employment . . . " and accordingly reversed. *Philbrook v. Ansonia Board of Education*, 757 F.2d 476 (2d Cir. 1985).[1]

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1 Because neither the court below nor petitioners here have addressed the Free Exercise Clause claim, respondent also does not do so. If the judgment below is reversed as to the statutory claim, it should be remanded for consideration of the Constitutional issue.

SUMMARY OF ARGUMENT

I.

The Ansonia Board of Education permits its employee schoolteachers three days annual paid leave for "necessary personal business," but it prohibits them from using any of this leave for "any religious observance." This prohibition is explicit facial discrimination on the basis of religion, in violation of Title VII. It is unlawful without reference to the additional duty of reasonable accommodation, which applies to claims of religious discrimination based upon the application to religious observers of facially neutral rules. Religious observers in Ansonia are explicitly prohibited from using their personal leave days to conduct their important and necessary personal business on the announced ground that their business is religious in nature.

The District Court made no relevant findings that could possibly justify this discriminatory treatment of religious observance. Instead, it concluded that proof of religious discrimination required a showing that an employee is at risk of "losing his job." But Title VII clearly prohibits any discrimination with respect to "compensation, terms, conditions, or privileges of employment," and that is precisely what is involved here. Because the judgment of the District Court relied on a plainly erroneous notion of the requirements for proving a claim of religious discrimination under Title VII and was unsupported by any relevant findings, the judgment of the Court of Appeals, remanding to the District Court for appropriate find-

ings, was plainly correct. *Pullman-Standard v. Swint*, 456 U.S. 273, 291-92 (1982).

In fact, the record compels the conclusion that the personal leave provision is unlawful facial discrimination under Title VII. Whether or not Ansonia is required to provide any personal leave at all, it may not, consistent with Title VII, allocate any of the components of the employment relationship, including personal business leave, on a discriminatory basis. Its personal leave provision is discriminatory on its face. This is sufficient in and of itself to make out a violation of Title VII. The leave provision for personal business needs is a general one, which would include religious needs were it not for the explicit exclusion of religious observance. The personal leave provision allows leave for purposes and activities so similar to religious observance in both function and content that the explicit exclusion of religious observance must be deemed discrimination against religious observance.

This facial discrimination is neither eliminated nor justified by the allotment of three days paid leave for religious observance. This is so for several reasons: First, the prohibition on using personal leave for *any* religious observance is more encompassing than the allocation of religious leave, which extends only to mandatory religious holidays. More fundamentally, the discrimination against religious observance in the personal leave provision sur-

vives the granting of some religious leave. Although the Board allows Philbrook to take a combined total of six days for religious and personal leave, it explicitly prohibits him from using three of those days for religious observance, on the ground that it is religious. In addition to this discrimination against religious observance, the leave provision also discriminates against certain religious observers: The Board's policies allow a teacher whose religious obligations demand only three days leave to fulfill those obligations completely and also to take additional leave for his most important remaining personal needs, solely because those remaining needs are secular; by comparison, Philbrook's remaining needs are unauthorized, and Philbrook is therefore disadvantaged, solely because those needs are religious in character.

Petitioners' various arguments that the exclusion of religious observance from personal leave is necessary to achieve "parity" and "balance" between religious and secular needs also fail. They are unsupported by any findings below; they ignore the fact that the exclusion of other limited secular categories from personal leave does not authorize exclusion of religion because religion, unlike those categories, is protected from discrimination by Title VII; and they ignore the lack of "parity" that remains. In the end, though, all the arguments about parity miss the critical point about Title VII: Title VII makes facial discrimination against religious observance illegal in and of itself without regard to possible defenses of reasonable-

ness. To attempt to determine whether one disadvantaging religious classification is "balanced" by other religious provisions is to misunderstand the statute's fundamental hostility to classifications, like the one here, that on their face disadvantage religious observance. Such classifications are plainly and simply unlawful discrimination.

II.

The Board's leave policy implicates the duty of reasonable accommodation as well. When Philbrook is docked a day's pay for being absent to fulfill his religious obligations, he is not simply receiving no pay for no work. On the contrary, the nature of his employment requires him to do substantial amounts of work in connection with each of these unpaid days. Each absence for religious observance therefore entails substantial work for no pay. This circumstance triggers Title VII's reasonable accommodation requirement and required the employer, and the District Court, to inquire whether reasonable accommodation—along the lines suggested by Philbrook, the EEOC, and the Connecticut Commission on Human Rights and Opportunities, or in some other fashion—was feasible without undue hardship. The failure of the District Court to make *any* such inquiry makes the judgment of the Court of Appeals remanding for appropriate findings plainly correct.

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ARGUMENT

I. THE RULE THAT PERSONAL BUSINESS LEAVE MAY NOT BE USED FOR "ANY RELIGIOUS OBSERVANCE" DISCRIMINATES ON THE BASIS OF RELIGION IN VIOLATION OF TITLE VII.

A. The Personal Leave Provision Facially Discriminates on the Basis of Religion.

Ansonia public school teachers are entitled by contract to three days of paid annual leave for "necessary personal business," but they are prohibited from using any of these days for "any religious activity," or "any religious observance." J.A. 71-101. Because, under Title VII, "[t]he term 'religion' includes all aspects of religious observance and practice . . .," 42 U.S.C. Section 2000e(j), this prohibition on its face discriminates on the basis of religion. It is equivalent to an explicit prohibition against use of personal business leave by members of a religious faith or, for that matter, a racial group. This explicit, facial religious discrimination is unlawful without reference to the additional requirement of Title VII, *id.*, that employers in some instances adjust facially neutral rules in order to "accommodate" religious observance. *See Trans World Airlines v. Hardison,* 432 U.S. 63 (1977).

The District Court's treatment of this claim was plainly insufficient and just as plainly required the judgment of the Court of Appeals reversing the District Court and remanding for further proceedings. The basis for the trial court's dismissal of Philbrook's claim was that since Philbrook was not "placed . . . in a position of violating his religion or *losing his job,*" App. 37a (emphasis added),

he had not proved any discrimination. This is simply wrong as a matter of law: As the Court of Appeals noted, 757 F.2d at 482-83, this reasoning is inconsistent with Section 703(a)(1)'s prohibition of discrimination in "compensation, terms, conditions, or privileges of employment. . . .," 42 U.S.C. Section 2000e-2(a)(1). Title VII prohibits discrimination in the distribution of employment benefits, not simply in decisions to hire and fire. The District Court's approach would allow an employer to provide annual leave to everyone except Catholics or for every purpose except religious observance. Whatever the Board's obligation would be in the *absence* of a policy of providing personal leave days, Title VII prohibits it from *allocating* these personal leave days on a discriminatory basis:

> A benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free . . . not to provide the benefit at all. Those benefits that comprise the "incidents of employment," S.Rep. No. 867, 88th Cong., 2d Sess., 11 (1964), or that form "an aspect of the relationship between the employer and employees," . . . may not be afforded in a manner contrary to Title VII.

Hishon v. King & Spalding, 467 U.S. 69, 75-76 (1984) (footnotes and citation omitted).

The District Court's plain legal mistake in rejecting Philbrook's claim because he was not "placed . . . in the position of violating his religion or losing his job," App. 37a, is sufficient to justify the Court of Appeals' reversal of the District Court's judgment. This is the only issue this Court need decide in this case. *Pullman-Standard v. Swint,* 456 U.S. 273, 291-92 (1982).

In addition to its plain legal error, the District Court made no other findings or conclusions to justify approval of the Board's facial religious classification or to support its judgment. If there is any basis for such approval, it was not found by the District Court, and the Court of Appeals was right to reverse on this basis also. *Id.*

In fact, no legally adequate justification for the Board's facial discrimination is possible, as review of the defenses petitioners raise will demonstrate. These defenses fall into two groups: the first is the contention that the personal leave provision standing alone does not raise a question of facial discrimination because it is a narrow category of special leave; the second are arguments that the leave provisions as a whole are non-discriminatory in view of the three days provided for religious leave. These two groups of defenses will be discussed in turn.

B. The Breadth and Function of the Personal Leave Provision Confirm That Exclusion of Religious Observance Is Discriminatory.

The Board and the AFL-CIO amicus suggest that the personal leave provision is not discriminatory because it is a narrowly defined category, similar to sick leave, which has nothing to do with religious observance. An employer can, they argue, give paid leave for specific, defined secular reasons without allowing that leave also to be used for religious observance. The difficulty with this argument is that it does not apply to this case: Philbrook does not seek an expansion of a "special purpose" leave to include his religious observance but simply elimination of the religiously discriminatory exclusion of religious observance from the broad general category of personal

leave. Through this category the Board has already recognized the importance of providing leave for a sufficiently wide range of "personal" reasons that the exclusion of personal reasons that are "religious" in nature must be viewed as discrimination. *See Widmar v. Vincent*, 454 U.S. 263 (1981).

To be sure, an employer who gives leave for a legitimate special purpose is entitled to test claims for use of that leave by whether they fit within that purpose. Thus an employee who sought to use sick leave to observe a religious holiday would be barred, not because his purpose was religious but because it was not for illness. On the other hand, an employer who gave paid leave (as the Board does) for attendance at weddings could not restrict use of this leave to non-religious wedding ceremonies without violating Title VII. In effect that is what the Board has done here. As the Court of Appeals noted, 757 F.2d 476, 485 & n.8, the district judge failed to make any findings regarding the scope of personal business leave, and certainly made no findings that would support the attempt to justify the Board's facial discrimination on the ground that the personal leave category is a narrow, special purpose one.

In fact, the category of "personal business" leave is a broad one that would clearly include religious observance but for the explicitly discriminatory exclusion. The very wording of the provision confirms this. The fact that religious observance is excluded from the definition of personal business shows that religious observance is prohibited because it is religious, not because it is outside the general category of necessary personal business. It

would serve little purpose for an employer to state that sick leave, for example, does not include observance of religious holy days, but without an explicit religious exclusion attendance at weddings would be expected to include attendance at religious weddings, and important and necessary personal business would be expected to include important and necessary religious business as well as secular business.[2] Nothing in the history of the administration of the personal leave provision suggests that it is narrower in application than it appears on its face.[3]

While the simple fact that the Board has explicitly restricted a benefit category on the basis of religion is sufficient to condemn the practice, see pp. 7-9, *supra*, the very fact that the personal leave category is a general one confirms that the exclusion is discriminatory. Because the

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2 It is no answer to a claim of discrimination that since religious observance is excluded from personal leave by definition, personal leave is, by definition, inapplicable to religious observance. A discriminatory definition is unlawful: An employer could not define "weddings" to include only secular weddings or "religious holy days" to include only holy days described in the New Testament.

3 Until the 1978-79 school year personal business leave was "at the teacher's discretion . . ." J.A. 73-93. That is, while notice to the employer was necessary, its approval was not, see J.A. 52, 147 (required notice is simply claim for personal day, not description of planned activity), and the only limitations on the use of personal business leave were the exclusions on the face of the contract. J.A. 53. Since 1978, one personal business leave day has continued to be at the teacher's discretion, while the other two require approval. Petitioners introduced no evidence at trial, however, of any limitations on the use of even these personal business leave days other than those listed in the contract. J.A. 53 ("Q: How do you determine in a given case what constitutes necessary personal business? A [by the school superintendant]: Well, it would be business that is not listed in the contract.")

personal leave category is general, it includes a range of secular activities directly analogous to religious observance—sufficiently analogous that the exclusion of religious observance from the benefit category involves a favoring of secular activities over "similarly situated" religious ones, thereby violating the fundamental principle of non-discrimination that "like situations should be treated alike."[4] Consider the circumstance of religious teachers: For teachers who are religious observers, activities which are part of their "necessary personal business" may be part of their religious activity or observance. For such teachers, the prohibition on religious activity or observance is equivalent to a prohibition on their most important and necessary personal business—a discrimination against personal business that is religious in character.

For example, a teacher may require a personal business day for an important family meeting or function; for charity work; or to better him or herself through study. Nothing in the record suggests that any of these activities or purposes would be unauthorized uses of personal leave time. But for a religious teacher, any of these activities may constitute religious activity or observance. Activities which are permissible personal business for a non-religious teacher thus may become pro-

4 The principle that "similarly situated" or "like situations" should be "treated alike" has long been recognized by this Court as a fundamental principle of equality and non-discrimination. *See, e.g., City of Cleburne v. Cleburne Living Center,* — U.S. —, —, 53 L.W. 5022, 5023 (July 1, 1985); *Plyler v. Doe,* 457 U.S. 202, 216 (1982); *Rostker v. Goldberg,* 453 U.S. 57, 79 (1981); *Michael M. v. Superior Court of Sonoma County,* 450 U.S. 464, 469 (1981); *id.* at 477-79 (concurring opinion); *F.S. Royster Guano Co. v. Virginia,* 253 U.S. 412, 415 (1920).

hibited for the religious teacher solely because his motivation in conducting these activities is religious. Under Title VII, whether or not a sense of religious obligation motivates a given activity of an employee on his personal leave cannot legitimately be any of the employer's business.

Just as the same activity may be either religious or secular depending on the motivation of the actor, so also mandated church attendance may serve many of the same functions in the life of a religious teacher that secular "necessary personal business" does in the life of secular employees. For a religious observer, mandated attendance at holy day services may be a more effective way to promote family understanding and unity than a secular counseling session, and provide better advice for conducting one's affairs than a visit to a lawyer. In short, the distinction between religious observance or activity, including observance of religious holy days, and at least some forms of important and necessary secular business is simply a distinction based on religion: Religious observance is prohibited because it is religious, not because there is some other way in which the personal leave provision is inapplicable to religious observance.[5] It is precisely this basis for unequal treatment which is prohibited by Title VII.

5 This is not to deny the distinctive character of religious observance, in particular the special compulsion that religious obligation exerts on the devout. Indeed our nation's appreciation of the special significance and importance of religious observance, at least to the observer, is reflected in both Title VII and the Free Exercise Clause. But there is nothing about the unique characteristics of religious observance which justifies an employer selecting it for unfavorable treatment in the way the Board has here.

C. The Religious Leave Provision Does Not Eliminate or Excuse the Discrimination in Allowance of Personal Leave.

The Board argues that its discrimination in personal business leave is justified because the Board provides three days paid leave for observance of religious holidays and its leave policies, taken together, create a "parity" between the recognition of religious and secular needs. *Petitioners' Brief* 17, n.6. In making this argument, the Board is asking this Court to approve its apparently discriminatory personal leave policy without the benefit of any supporting findings by the trial court. Because the trial judge erroneously concluded that Title VII does not apply to employment discrimination short of discharge, it had no occasion to consider whether the apparent facial discrimination of the personal leave policy was justified by the religious leave allowance, and absent any such consideration, or supporting findings or conclusions, the Court of Appeals plainly could not affirm the District Court's judgment. *Pullman-Standard v. Swint,* 456 U.S. at 291-92. In fact, the religious leave provision does not cure the discrimination against use of personal leave for religious observance.

1. *The two provisions are not equivalent in scope.*

As a matter of fact, the separate religious leave permitted is not at all equivalent to the religious observance which is prohibited as personal leave. Paid leave is permitted only for some religious observance (holy days whose observance is mandatory under written denominational law), but it is prohibited as personal business leave for *all* religious observance.

2. *The discriminatory nature of the personal leave provision remains.*

Furthermore, a separate provision for some religious leave does not eliminate the basic discrimination created by the personal leave provision between religiously-based personal needs and secular personal needs. A person like Philbrook has religious needs that require more than the three days leave explicitly provided for religious needs. The combined effect of the three-day religious leave provision and the three-day personal leave provision allows Philbrook a total of six days of leave for religious and other personal needs, but bars him from using three of those days for religious observance. Having concluded that six days of paid leave for religious and other personal needs are acceptable, the Board may not forbid using three of those days for personal needs related to religious observance. To do so amounts to discrimination against religious observance.

The combined effect of the religious and personal leave provisions also disadvantages certain religious observers as compared to other religious observers. For illustration, compare Philbrook's situation to that of a Jewish teacher who takes advantage of the explicit provision for three days of religious leave and whose religious needs are fully met by taking two days leave for Rosh Hashanah and one for Yom Kippur.[6] Thereafter, the teacher is free to use his personal leave days for his most pressing personal needs—including many personal

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6 The evidence is that the leave provisions were consciously tailored to address the particular needs of this group of observers. J.A. 24.

needs closely analogous to religious ones, such as charitable works (provided they are engaged in for secular motivations and are not religious activities), other action compelled by conscientiously held ethical beliefs (provided these ethical beliefs are not religious), important family occasions (provided they are secular and not religious occasions), or educational study (provided it is not religious devotion).

On the other hand, after Philbrook uses up his three days for religious leave, Ansonia's personal leave policy does not allow him to use the remaining three days of personal leave for the personal business that is most important and pressing to him: religious activity and observance. Unlike the Jewish teacher, Philbrook is a member of a faith that requires more than three days away from work for religious observance. *His* important and necessary personal business, involving fulfilling his need to gain understanding of the world around him, to serve the highest interests of his community, and to provide guidance and stability for his family, are all served by performing his religious obligation and attending his church. Solely because these needs are fulfilled for him through religious observance rather than secular activity, he is prohibited from using his personal leave to meet them.

At bottom, the specious equality achieved by discriminating against religious observance in allowing personal business leave reflects an incomprehension of the role of religious observance in the life of devoutly religious people. Having used his three days for religious observance, Philbrook is prohibited from using his allotted personal business leave to conduct the necessary personal business that

is most important to his life, solely on the basis of religion. It is in the nature of an involved religious life that personal business is commonly religious in nature, and it is not equality but discrimination to provide teachers with differing religious needs equal opportunities to participate in necessary personal business only so long as that business is secular.[7]

Philbrook's objection to the Board's leave scheme is *not*, as petitioners try to suggest, that the "provision of three days paid leave for religious observance does not meet his need for religious leave while the needs of some of the school board's teachers are fully met." *Petitioners' Brief* 9. Philbrook is not arguing that an employer has some sort of affirmative duty to allow whatever number of days of paid leave a religious observer wants. The critical fact in this discrimination case is that the Board has itself already provided for personal leave days in addition to the three explicitly allowed for religious observance; however, it prohibits employees from using these *already provided* personal leave days for religious observance. The discrimination against religious observance involved in this case is that petitioners refuse to meet Philbrook's additional needs explicitly *because* those needs are religious, while agreeing to meet similar or analogous needs because they are *not* religious.

The Board simply has no interest in this facially discriminatory prohibition adequate to justify it, much less one which was found by the District Court. The costs to the Board in terms of pay to Philbrook and lost efficiency

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7 Respondent has not taken a (secular) personal leave day since 1974. Pl. Ex. 18.

through use of a substitute are the same whether Philbrook's needs are secular or religious in nature. Having agreed to permit Philbrook leave for personal business with pay, the Board is not now in a position to complain about the costs that such leave will entail, since the costs for religiously motivated leave are the same as for secularly motivated leave. Petitioners argue that costs would increase because Philbrook, and perhaps others, would be more likely to take personal leave days if they were allowed on a nondiscriminatory basis. The District Court, however, made absolutely no findings on this contention.[8] But the more important point is that increased costs cannot justify a discriminatory rule. Denying leave to women workers or Black workers would also reduce costs, but it is the purpose of Title VII to prohibit savings from being extracted in a discriminatory fashion.

3. *Petitioners' other "parity" arguments fail.*

The Board suggests a number of other versions of the argument that its leave policies create "parity" between religious observance and secular personal needs.[9] For

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8 The costs involved are trivial. Few teachers use all the days of religious leave currently allowed, and religious absences account for far less than one percent of all absences. Pl. Ex. 18. And there is no evidence that anyone other than Philbrook and one other teacher, now retired, have ever sought to use more than three days for religious observance.

9 The Board also seeks to have this Court insulate it from liability because its discriminatory rule is part of a collective bargaining agreement. But the concerns of the *Hardison* court with the collectively bargained rights of co-employees, 432 U.S. at 79-83, are not at all implicated here. Elimination of discrimination against Philbrook would not entail any impingement on the

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example, it suggests that since personal leave is denied for some secular purposes, it must also be denied for religious observance. But the fundamental distinction between religious observance and the other activities the Board excludes from personal leave is that religious observance is protected by Title VII and the others are not. *See Shaw v. Delta Airlines,* 463 U.S. 85, 103 (1983) ("Title VII is neutral on the subject of all employment practices it does not prohibit").

Petitioners also argue that their discrimination with regard to personal business leave is necessary or permissible in order to offset what would otherwise be a religious "preference" in the religious leave provisions. *Petitioners' Brief* 30. Once again, this argument rests on the incorrect factual premise that the religious exclusion from personal leave is no greater in scope than the religious leave provision. More importantly, this attempt to portray the respects in which the leave provisions might create some "parity" between religious observance and secular leave altogether ignores the fundamental ways, discussed at length above, pp. 14-18, in which the leave provisions clearly create a discriminatory *lack* of parity between religious observance and secular activities: The Board allows em-

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interests of his co-employees. He does not ask that he be given leave *instead* of a co-employee; when he is absent his work is performed by a substitute, not a reluctant fellow teacher. Indeed the union has sought to persuade the Board to eliminate the discrimination against Philbrook. J.A. 66. In these circumstances *Hardison* is relevant because of its affirmation that " . . . a collective bargaining agreement . . . may [not] be employed to violate the statute . . . ." 432 U.S. at 79. In this connection it is noteworthy that neither the union nor the AFL-CIO amicus has suggested that the existence of the collective bargaining agreement provides any basis for reversal.

ployees six days for religious and other personal leave, but those people who need more than three days leave for *religious* purposes rather than *secular* purposes are not permitted to take their personal leave for their religious observance. That is not "parity" between religious observance and secular activities but facial discrimination against religious observance.[10]

In the end, though, the Board's cluster of arguments attempting to establish that its various religious-based classifications create "parity" are all fundamentally irrelevant. Where an employer extends an employment benefit in a way

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10 This discriminatory "balancing" of the religious leave provision is certainly not required by either the Constitution or Title VII. As this Court and Congress have recognized, voluntary reasonable accommodation of the special needs of religious observers is neither establishment of religion nor religious discrimination under Title VII, and discrimination *against* religious observers cannot be justified on the ground that it is necessary in order to counteract such an accommodation. Whether or not required by the Constitution or Title VII, *cf. Estate of Thornton v. Caldor,* — U.S. —, —, 53 L.W. 4853, 4856 (June 26, 1985) (O'Connor, J., concurring), allowance of a few days of religious leave is certainly a *permissible* accommodation of religious differences in a pluralistic society. *See Bowen v. Roy,* — U.S. —, —, 54 L.W. 4603, 4608, n.19 (June 11, 1986) (plurality opinion). Religious leave days are particularly appropriate here in view of the complete accommodation of the religious needs of the majority by the school calendar's five day week and holidays on Christmas, Easter, and Good Friday.

In any event, any special accommodation involved in the religious leave provisions is not materially affected by discrimination in personal business leave. While the discrimination in personal business leave reduces the number of days employees make take for religion, it does not reduce the number of days religious employees have for purposes not available to secular employees. Discrimination in the personal leave provision serves only to penalize one or two teachers whose religious faith is outside Ansonia's mainstream, without affecting the general availability of religious leave.

that *facially disadvantages* religious observance, as the Board's personal leave provision does, under Title VII the courts should not accept an invitation to measure whether *other* employment benefits achieve "parity." Title VII represents a Congressional policy condemning classifications that on their face disadvantage religious observance, just as it condemns classifications that on their face disadvantage racial groups. Such classifications are suspect under the Constitution, *see Larson v. Valente,* 456 U.S. 228 (1982), and are presumptively unlawful under Title VII.[11] The inquiry is not whether they operate on balance, in conjunction with other employment benefits, to disadvantage some group of employees; such classifications are unlawful in themselves. *See Newport News Shipbuilding & Drydock Co. v. EEOC,* 462 U.S. 669, 685, n.26 (1983).[12]

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11 Title VII contains no exception to liability for compelling justifications, much less for considerations of "reasonableness" or "parity." It permits only certain very narrowly defined defenses, such as where bona fide merit and seniority systems are involved, 42 U.S.C. Section 2000e-2(h), or where religion is a bona fide occupational qualification, 42 U.S.C. Section 2000(e)-2(e), none of which is applicable here.

12 Section 701(j) limits the inclusion of religious observance in its definition of religion by excepting situations where "an employer demonstrates that he is unable to reasonably accommodate to an employee's . . . observance . . . without undue hardship on the conduct of the employer's business." 42 U.S.C. Section 2000e(j). This exception does not of course convert this case into the usual reasonable accommodation case, like *Hardison,* in which an employer is asked to make an exception to a neutral rule in order to accommodate the special religious needs of an employee. Here the only "accommodation" needed is elimination of a facially discriminatory distinction. Even assuming that permitting use of personal business leave for religious observance would entail more than de minimis costs for the Board, the definition's exception cannot be read to extend to cases of facial discrimination. A contrary reading would justify a leave policy permitting a given number of days off with pay per year and providing that all of those days could be used for any purpose whatever, except religious observance.

Comparison with *Los Angeles Department of Water and Power v. Manhart,* 435 U.S. 702 (1978), is especially instructive. In *Manhart,* this Court held that an employer violated Title VII when it withheld more money from female employees than from male employees for their pensions. The Court rejected arguments that this facial disadvantaging of female employees could be justified by the fact that females had a greater life expectancy and accordingly an expectation of receiving more pension benefits. Perhaps the employer's scheme would achieve some form of parity in the end, and perhaps in the pension context the explicitly sex-based classification served some rational purpose, but Title VII reflects Congress's firm view: Disadvantaging female employees by means of explicit classifications "based on sex" is presumptively impermissible.[13] *See also, Arizona Governing Committee v. Norris,* 463 U.S. 1073, 1080-86 (1983) (plurality opinion). Title VII should not be construed in such a way that when employers discriminate against religious observers in one employment provision courts are then required to assess whether other provisions create "parity."

Title VII's rejection of classifications that disadvantage religion and religious observance—Title VII's refusal to allow case-by-case assessment of their reason-

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13 The dissenters in *Manhart* relied for their position on the existence of a separate statute, commonly called the Bennett Amendment, 42 U.S.C. Section 2000e-2(h), that, they argued, allowed the sex-based classification there. No possibly exculpatory statute exists to insulate the Board from liability in this case. Indeed, the *Manhart* dissenters explicitly stated that "[t]his case, of course, has nothing to do with discrimination because of . . . religion. . . . The qualification the Bennett Amendment permitted . . . pertained only to claims of discrimination because of sex." 435 U.S. at 728, n.3.

ableness—is not an idiosyncratic policy, but one that reflects the long experience of many societies. That experience teaches us, and taught Congress, that classifications disadvantaging religious observance generally reflect unworthy motives, threaten religious liberty and are deeply divisive. That is why classifications based on religion are suspect under the Constitution, *Larson v. Valente,* 456 U.S. at 245-46, and why Congress forbade them under Title VII, without requiring case-by-case assessment of their supposed reasonableness. The District Court offered no justification for the Board's practice in this case and, under Title VII, no such justification exists.

II. THE REQUIREMENT THAT PHILBROOK WORK WITHOUT PAY IN CONNECTION WITH DAYS HE IS ABSENT FOR RELIGIOUS OBSERVANCE TRIGGERS A DUTY OF REASONABLE ACCOMMODATION.

Petitioners have characterized this case as raising broad questions about the scope of the duty of reasonable accommodation under Title VII. They have been free to do so because of the failure of the District Court to make any findings which would frame the accommodation questions actually at issue here. This failure makes the judgment of the Court of Appeals remanding for findings clearly correct. In fact, the accommodation question actually presented by this case—which is quite distinct from the facial discrimination question discussed in part I., above—is narrower and more straightforward than petitioners suggest and compels the conclusion that on the facts of this case the Board had a duty, which it did not fulfill, to seek reasonable accommodation of Philbrook's religious observance.

The dissenting judge below, joined by the Board and the amici here, view this case as applying the principle of "no work—no pay". *See* 757 F.2d 476, 488 (Pollack, J., dissenting). In this view, Title VII's reasonable accommodation requirement is not triggered by the loss of pay a religious employee suffers because he refrains from work for religious reasons, and Philbrook therefore has no complaint on account of being docked the equivalent of one day's salary for each day he is required to take unauthorized leave for religious observance. But whatever the merits of this view of the statute, it is simply not applicable to the facts of this case because Philbrook's job required him to perform a substantial amount of work in connection with each of the days for which his pay was docked. This case is therefore one of "substantial work-no pay," requiring inquiry into the feasibility of an accommodation to mitigate the burden of the Board's requirement that Philbrook work without pay in connection with his absence for religious observance.

The assumption that this is a no work-no pay case assimilates respondent's job as a school teacher to day labor, in which all the duties of the position are performed during working hours on the job site. In fact, Philbrook's work is not limited to attending his classes any more than a judge's work is limited to the hours court is in session. He performs a substantial amount of work in connection with the days he is absent for religious reasons. J.A. 68-70. His job has at least three parts: For every class he must first prepare the lesson plan; then teach the class; and finally review his students' classwork. On the days he is absent for religious holy days, he prepares the lesson plans for his classes and reviews them with his substitute. He then receives and corrects the assignments his students have completed in his absence. *Id.* Although his pay is docked, he is still required to perform a substantial fraction of the duties for which his pay was intended to compensate him.

Having to do work for no pay plainly disadvantages Philbrook "with respect to compensation, terms, conditions or privileges of employment." 42 U.S.C. Section 2000e-2(a). Accordingly, this case squarely presents the question of whether any reasonable accommodation was feasible under *Trans World Airlines v. Hardison* to mitigate Philbrook's loss of pay.[14] The issue of who gets to choose which of two or more accommodations is adopted, both of which eliminate the penalty on an employee for exercising his religion, however, is *not* presented by this case because the Board has not implemented or proposed any accommodation which would mitigate Philbrook's injury—having to work for nothing in connection with absence for religious observance.

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14 This is a case, envisaged by the Ninth Circuit in *American Postal Workers Union v. Postmaster General*, 781 F.2d 772 (9th Cir. 1986), in which, assuming the Board made efforts to accommodate Philbrook's religious practice, Philbrook still has a conflict between his religious practice and what the Ninth Circuit termed his "employment status," i.e., his compensation, terms, conditions, or privileges of employment. 781 F.2d at 776. As the Ninth Circuit explained, only accommodation which eliminates all the burdens on "employment status" relieves the employer from the requirement to consider alternative accommodations short of undue hardship. 781 F.2d 776-77. *See also*, 29 C.F.R. Section 1605.2(c) (1980) ("Some alternatives for accommodating religious practices might disadvantage the individual with respect to his or her employment opportunities, such as compensation, terms, conditions or privileges of employment.") Where as here disadvantage in compensation and terms and conditions of employment continues to burden religious exercise, the employer is not relieved of its duty to make reasonable accommodation.

Because the District Judge did not consider either whether having to work for no pay burdened Philbrook's religious practice or whether any accommodation was feasible short of undue hardship under *Hardison*, the Court of Appeals was correct to remand. *Pullman-Standard v. Swint*, 456 U.S. at 291-92.

On the present record, no reason appears why either permitting the use of personal leave for religious observance or docking Philbrook only the cost of a substitute, not his entire salary, and permitting him to make up lost time on other assignments, would not be reasonable accommodations free of undue hardship to the Board. Evidence that Philbrook's absence might result in lost efficiency in the classroom is beside the point on the accommodation question actually presented by this case. The Board agrees Philbrook may be absent; the only question is whether it may burden that absence with unpaid work, and it is this obligation to perform unpaid work, not the absence itself, which the Board must accommodate short of undue hardship. The Board has suggested that paying Philbrook anything more than he now receives would involve more than the de minimis costs contemplated by this Court in *Hardison*. But these costs are not additional expenditures for the Board; they are simply a reduction in the amount of money the Board would save under the current regime by docking Philbrook's salary. Additionally, it is reasonable to impose these costs on the Board since they actually represent in whole or principal part simply compensation for Philbrook's work as a teacher in connection with the days he is absent for religious observance.

Finally, because the prohibition on use of personal leave for religious observance is discriminatory and illegal

and serves no valid purpose of the Board, its elimination is also a reasonable accommodation of Philbrook's observance. No reason has been suggested why permitting this use of personal leave would be an undue hardship for the Board, and accordingly the Court of Appeals was right to direct the District Court to consider this accommodation as well.

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CONCLUSION

Accordingly, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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